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IN THE

Supreme Court of the United States

October Term, 1957.

No. 428

BENJAMIN N. LITMAN,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Benjamin N. Litman, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on July 8, 1957.

I. OPINION BELOW.

The opinion below has not yet been reported (Appendix B, pp. 6a-19a).

II. JURISDICTION.

The judgment of the Court of Appeals (Appendix C, p. 11a) was entered on July 8, 1957. A timely petition for rehearing was denied on August 6, 1957 (Appendix, p. 12a). The jurisdiction of this Court is invoked under the Act of June 25, 1948 ch. 646 Stat. 928, 28 U. S. C. § 1254(1).

III. QUESTIONS PRESENTED.

1. Whether, in order to sustain a conviction for knowingly and willfully failing to file income tax returns at the times required, in violation of § 145(a) of the Internal Revenue Code of 1939 and § 7203 of the Internal Revenue Code of 1954, it is incumbent on the prosecution to prove that petitioner had an evil motive, in addition to the mere late filing of the returns.

2. Whether a conviction for knowingly and willfully failing to file income tax returns at the times required by law can be sustained where the evidence shows that the defendant (petitioner) relied on his accountant to file timely returns or to maintain him in good standing with the Internal Revenue Service; that his accountant obtained extensions of time for filing the returns; that the petitioner and his accountant never knew that late filing of returns would be criminal; that the returns were filed 6 months before the information against the petitioner was made by the Government and the Trial Judge refused to charge as requested that if the petitioner's failure to file timely returns was due to the negligence or carelessness of the accountant, the petitioner must be found not guilty.

IV. STATUTES INVOLVED.

1. § 145(a) of the Internal Revenue Code of 1939, 26 U. S. C. 145 provides:

"§ 145. Penalties

"(a) Failure to file returns, submit information, or pay tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or

regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

2. § 7203 of the Internal Revenue Code of 1954, 26 U. S. C. 7203 provides:

"WILFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

V. STATEMENT OF THE CASE.

Petitioner, a physician operating a small hospital, was charged by an information in 3 counts filed September 13, 1956, with willfully and knowingly failing to file federal income tax returns at the proper times for the years 1952, 1953 and 1954.

THE GOVERNMENT'S EVIDENCE.

Charles Brahin, a certified public accountant, filed the petitioner's income tax returns for 1948 to 1951, inclusive, and was engaged by the petitioner to prepare and file his returns for 1952, 1953 and 1954 before such returns were due to be filed (R23a-R24a).

During 1953, Brahin requested 3 extensions of time for filing the 1952 return, which requests were granted by the District Director of Internal Revenue, the last such extension expiring on September 15, 1953 (R12a-R15a).

During 1954, Brahin also requested 3 extensions of time for filing the 1953 return, which requests were granted, the last extension expiring September 15, 1954 (R13a-R15a).

During 1955, Brahin requested 4 extensions of time for filing the 1954 return, which requests were granted, the last extension expiring on October 15, 1955 (R14a-R15a).

All requests for extensions of time were made by Brahin in writing over his signature and on his letterheads and stated as the reasons for the desired extensions that Brahin was ill and overburdened with work and that he was unable to complete the petitioner's returns. On one occasion only, August 13, 1953, the request for an extension showed the signatures of both Brahin and the petitioner (R13a).

On May 23, 1955, the Internal Revenue Service, in a letter to the petitioner, inquired whether the income tax returns for the years 1952, 1953 and 1954 had been filed (Exhibit G8) (R78a). In response to this letter, Brahin telephoned William F. Lynn, Jr., Special Agent, Internal Revenue Service, stating that the filing of income tax

returns for the years 1952, 1953 and 1954 had been delayed because the petitioner's son was critically ill, the petitioner was ill, the petitioner had a dishonest bookkeeper and the petitioner and Brahin were unable to find the necessary records after the bookkeeper left the petitioner's employ (R29a).

On June 6, 1955, the petitioner wrote to the Director explaining that the return for 1952 was delayed because of the illness of the petitioner's son and the difficulties the petitioner had with his hospital affairs; that in October, 1953, he engaged one Irving B. Kruger, a certified public accountant, to bring the petitioner's records for 1952 up to date; that in December, 1953, Kruger had forged checks, was discharged and was arrested, convicted and sentenced to imprisonment; that after Kruger's discharge in December, 1953, the petitioner's records for 1952 and 1953 could not be found; and that the petitioner had finally found the records for those years among old medical records and that the records and returns for 1952 and 1953 were being completed and would be filed together with the return for 1954 (Petitioner's Exhibit 1) (R29a, R78a).

On December 15, 1955, Special Agent Lynn saw the petitioner, found him cooperative and affirmed the petitioner's reasons for failing to file timely returns (R19a). Lynn also spoke to Brahin in December 15, 1955, who advised him that he was preparing the petitioner's returns for the years 1952, 1953 and 1954 (R20a). Lynn arranged with Brahin that he and Agent Galato would look over his work papers and the returns before they were filed (R20a-R21a).

On January 26, 1956, Lynn and Galato met with Brahin and went over Brahin's work papers (R21a). Thereafter, Lynn and Galato were at the office of Brahin 5 or 6 times, 3 or 4 hours each time, checking figures and the work papers prepared by Brahin (R22a).

Brahin explained to Lynn and Galato that he was unable to file the petitioner's income tax return for 1952

because the cash disbursement book was incomplete (R25a); that efforts were made to complete the book for 1952 and that Kruger, a certified public accountant, was engaged in September, 1953, to bring the 1952 and 1953 cash disbursement book into shape; that when Kruger left in December, 1953, cancelled checks and checkbooks were missing for 1952 and 1953 (R25a) and that cash disbursement sheets for the years 1952 and 1953 were missing which were finally found among old medical records (R25a-R27a); that the petitioner's problem was large turnover and incompetent clerical help who, notwithstanding Brahin's instructions, did not maintain satisfactory cash disbursement records for 1952 and 1953 (R27a); and that while Kruger, after September, 1953, did a good job in writing up the cash disbursement books for 1952 and 1953, after Kruger left in December, 1953, missing pages of the books, checks and checkbooks could not be found although Brahin searched continuously from January, 1954, until sometime in 1955 (R25a-R27a).

The records of the Internal Revenue Service showed that for the year 1948 no estimated tax return was filed and that the 1040 return was filed on July 15, 1949, without penalty; that for the year 1949 no estimated tax return was filed and a final 1040 return was filed showing no tax due; and that for the year 1950 no estimated tax return was filed but a final 1040 return was filed delinquently on September 11, 1952, and a delinquency penalty imposed in the amount of $209.95 which was abated on affidavit by petitioner showing good reason for late filing and reduced to $75.58 (R6a-R9a-R16a).

The tax returns of the petitioner filed March 16, 1956, showed tax due for 1952 in the amount of $2,626.92 against which an estimated tax was paid, $845.00, with estimated returns filed March 15, 1952, and January 15, 1953, leaving a balance due of $1,781.96. The tax due for 1953 was $534.48 and for 1954 no tax was due. All taxes shown to be due were paid.

EVIDENCE FOR PETITIONER.

Brahin confirmed the statements attributed to him in Agent Lynn's testimony and in addition testified to the following effect:

He was a public accountant practicing approximately twenty years (R53a). He first began serving the petitioner in 1949. It was his decision to ask for extensions of time for filing the 1952, 1953 and 1954 returns and the petitioner never suggested that no returns be filed for the years in question (R36a). The requests for extensions made in 1953 for filing the 1952 return were necessary because he found early in 1953 that the cash receipt record for 1952 was unsatisfactory in that it failed to show the sources of the receipts broken down in explanatory columns so that Brahin could determine whether the receipts were from personal loans, mortgages, exchanges or earned income (R37a). He also found that the cash disbursement book for 1952 was not complete in that it failed to show a satisfactory classification of the disbursements and he could not distinguish between the disbursements that were purely personal and those that were business expenses (R38a).

During 1953, he instructed the petitioner's clerical help (7 or 8 different girls) in the manner in which the cash receipt and cash disbursement books were to be completed (R39a). By September 15, 1953, when the last extension for filing the 1952 return expired, the cash disbursements had not yet been properly written up for that year.

Brahin testified that it was not his practice to make up cash disbursement records for his clients (R45a); that the petitioner requested him to file a return even if it was not complete and Brahin said that no return should be filed unless it was complete (R46a-R47a).

The Government, in cross-examination of Brahin, made the point (R57a) that even after the entries were extended, the accountant checked them with the base records himself

and the extended entries could, therefore, have been just as easily made by him.

Brahin, in September, 1953, explained to the petitioner that he was still unable to file the return for 1952; that no further extensions could be obtained and that when a final return was filed he would be subject to a penalty of 5% and interest at ½ per cent per month (R45a). He never warned the petitioner that it was a criminal offense not to file a timely return because Brahin first learned that it was a criminal offense in February, 1956, when Agent Lynn so advised him (R45a-R49a).

While the 7 or 8 clerical employees of the petitioner whom the accountant instructed in 1953 to complete the 1952 records were incompetent, Mr. Kruger, CPA, was engaged in October, 1953, and, in the words of Brahin, did a good job in completing the records for 1952 and 1953 (R39a).

The accountant, after seeing that Kruger did a good job in October, 1953, made no effort to complete the 1952 returns until January 1954, when he called to obtain the records for preparing both the 1952 and 1953 returns (mistakenly referred to by the witness as October, 1953, on R39a. See R50a).

When Brahin came to the office of the petitioner in January, 1954, he found that pages from the cash disbursement book were missing for the years 1952 and 1953 (R40a); several months' cash receipt and cash disbursement sheets were missing for several months in each year as well as the check stubs (R40a-R41a).

He never advised the petitioner that the Internal Revenue Service must be advised that the records were partly lost in December, 1953, and that an estimated return should be filed (R60a). He admitted under cross-examination (R59a) that where records are lost or destroyed, it is proper to report the loss to the Government and obtain permission to use estimated figures. The petitioner requested

Brahin to file a tentative return and he refused to do so (R46a).

Brahin called at the petitioner's office during 1954 and 1955 sometimes once a month and sometimes 3 or 4 times each month, either to direct the writing up of the records or to hunt for them when they could not be found. Despite his searches, he did not find the missing records until it occurred to him to search among old medical records comprising over 1,000 folders in numerous cartons where he found the missing sheets inserted in different medical case folders as well as the missing checks and checkbooks and stubs (R42a). He could not understand how the missing record got among the medical records (R34a).

Upon finding the missing records Brahin engaged a Mrs. Sanders, during September, 1955, an experienced bookkeeper (R64a), for part time work. Mrs. Sanders took approximately a month to complete the cash receipt and disbursements records for 1952 and 1953, which were mainly completed when she took them over, and to write up the cash disbursement record for 1954 (R68a). After Mrs. Sanders completed her work (October, 1955), the month in which the last extension for filing the 1954 return expired, Brahin took 10 weeks to prepare his work papers (R47a). Agent Galato and Agent Lynn, beginning with January, 1956, met with Brahin periodically to go over the figures in Brahin's work papers (R48a), and the returns were finally filed on March 16, 1956, 6 months after Mrs. Sanders completed her work.

The jury found the petitioner guilty and he was sentenced to 60 days' imprisonment on each of the 3 counts, to run concurrently, and fined $500 on Count No. 1.

On appeal, the judgment of conviction was affirmed, the Court below saying (Appendix, *infra*, p. 8a) that "the defendant's failure to file income tax returns when due was willful in that the omission was advertent and motivated by the bad purpose of preventing the Government from receiving returns at the time required by law".

VI. REASONS FOR GRANTING THE WRIT.

The two points presented by this record in its present posture has an importance far transcending the fate of this individual. For indications are not wanting that the Courts of Appeals have succeeded in wholly obliterating a vital element in the criminal provisions of the Internal Revenue Code, contrary to the rule of law enunciated in *United States v. Murdock*, 290 U. S. 389 (1933).

VII. ARGUMENT.

1. The Court below, in its opinion affirming petitioner's conviction, stated as follows:

> "We think this evidence gave the jury an adequate basis for a finding that the defendant's failure to file income tax returns when due was 'willful' in that the omission was advertent and motivated *by the bad purpose of preventing the government from receiving returns at the time required by law.* . . . There was enough here to justify the jury in concluding that the defendant intentionally persisted in a course calculated to avoid or to disable himself from supplying his accountant with information appropriate and adequate for preparing his tax returns until the danger of governmental action became obvious and immiment. Since the evidence invited these inferences and defendant offered nothing to counteract them we think he is now in no position to complain that the jury was persuaded that he acted with bad purpose, intending not to fulfill the obligation of timely filing of which he was well aware. 'Punctuality is important to the fiscal system, and these are sanctions to assure punctual as well as faithful performance of these duties.' *Spies v. United States*, 1943, 317 U. S. 492, 496." (Italics supplied.)

In *United States v. Murdock*, 290 U. S. 394, *supra*, at pp. 395-6, this Court, in considering whether the word "wilfully" meant no more than voluntarily, said:

"This Court has held that where directions as to the method of conducting a business are imposed in a Revenue Act to prevent loss of taxes, and the Act declares a wilful failure to observe the directions a penal offense, an evil motive is a constituent element of the crime. . . . And the requirement that the omission in these instances must be wilful to be criminal is persuasive that the same element is essential to the offense of failing to supply information."

Clearly, not fulfilling the obligation of timely filing is not a criminal offense under the *Murdock* decision unless there is an evil motive and an evil motive in internal revenue can only mean the taxpayer is attempting to cheat the Government by concealing or attempting to conceal his actual tax liability.[1]

In this case, there is no such evidence of an evil motive since extensions for the filing of income tax returns were requested by the accountant for the petitioner and granted (R12a-R15a), and the tax returns for the years involved were all filed on March 16, 1956 (R4a). Having requested timely extensions for the filing of tax returns, the Government was notified by the petitioner that he had possible tax liabilities. If the petitioner had filed a false return, it might have remained unattacked because the tax authorities cannot possibly audit every taxpayer's return. If he had never asked for an extension, the tax authorities might not even have the starting point of detecting whether the petitioner was subject to attack. (It will be noted the amount of taxes due from the petitioner were relatively small sums—$1,781.96 for 1952, $534.48 for 1953 and none for 1954.)

1. The Court below (Appendix B, p. 10a) evidently relied on this Court's statement in *Spies v. United States*, 1943, 317 U. S. 492, 497-8, that the concept of willfulness means, "Mere voluntary and purposeful, as distinguished from accidental omission to make a timely return might meet the test of wilfulness." It is submitted with deference that this definition of willfulness is merely dicta and in conflict with the definition of willfulness in the *Murdock* case.

Therefore, since there was no proof of the indispensable ingredient of the offense charged in the information, viz., an evil motive, it follows that petitioner's conviction on the information cannot be sustained.

2. A. The District Judge was asked by the petitioner to charge the jury as follows:[2] "If you find that the defendant's failure to file timely returns for 1952, 1953 and 1954 was due to the negligence or carelessness of his accountant engaged to file such returns, you must find the defendant 'not guilty'." (R88a). Counsel for petitioner was "particularly anxious" to have this charge made. The request was refused (R83a).

The evidence discloses that the petitioner, a doctor, connected with a small hospital, when he was interviewed by the internal revenue agents, cooperated and answered all questions (R19a). The agents communicated by telephone with the accountant and were informed that he was going to file petitioner's tax returns in December of 1955 (R20a). The internal revenue agents later visited the accountant and were informed that he was engaged to file the tax returns for the petitioner, but that he was unable to file the returns because some of the records had been missing (R24a-26a). The missing records were found in 1955 (R27a).

The accountant testified that it was his decision to ask for the various extensions and that the petitioner never told him or suggested that no return be filed for the tax years of 1952, 1953 and 1954 (R36a). The accountant further stated that he told the petitioner that he could not file a return for him at that time and that it would "cost him five per cent penalty, and interest, one-half per cent a month", and that he never knew it was a criminal offense

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2. In *United States v. Murdock*, *supra*, the Court stated at page 396: "It follows that the respondent was entitled to the charge he requested with respect to his good faith and actual belief."

not to file a timely return[3] (R45a). The accountant further testified that the petitioner talked to him about filing a return even if it was not complete, but the accountant refused to file such a return (R46a-47a). The accountant continually stated that he never knew it was a criminal offense to fail to file a return on time, and that he was under the impression that there were only civil penalties (R49a, R50a, R53a-R54a). The accountant had been a public accountant for 20 years (R53a).

The evidence is uncontradicted that the petitioner relied on the accountant to file timely returns or to otherwise maintain him in good standing with the Internal Revenue Service; that in October, 1953, when Mr. Kruger, CPA, was engaged, he did a good job in bringing the records up to date (R39a), the accountant made no effort to prepare and file the 1952 return until January, 1954, when he called at petitioner's office to prepare both the 1952 and 1953 returns to be filed together (R39a, R50a); that the accountant at that time found some of the records missing for the years 1952 and 1953; that he did not file an estimated return (R46a, R60a) even though he admitted under cross-examination (R59a) that where records are lost or destroyed, it is proper to report the loss to the Government and obtain permission to use estimated figures; that he had all the records necessary to enable him to file returns for the years 1952, 1953 and 1954 by October, 1955, the month in which the last extension for filing the 1954 return expired, but the accountant took 10 weeks to prepare his work papers (47a) and then held up filing the returns until Agent Galato and Agent Lynn periodically went over the figures of the accountant (R48a).

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3. The government agent testified that it was the practice in the internal revenue office to impose a five per cent penalty if tax returns were filed beyond the period to which extensions were granted, but that if the taxpayer could show a good reason for not having filed the income tax return within the period that penalty was abated (R. 16a).

If the issue as to whether petitioner's failure to file timely returns was due to the negligence of his accountant had been submitted to the jury, this Court would normally be precluded from reviewing or disturbing the inference of fact drawn from the evidence by the jury, but the Court not only refused to so charge, but on the contrary, stated: ". . . it is the duty of the taxpayer himself to see that his return is filed." (R81a).

In *Bartchy v. United States*, 319 U. S. 484, where defendant was charged with the duty of keeping his local draft board advised of his address, this Court, in answer to the government's argument that the defendant is plainly obligated to keep in close communication with the forwarding address, that at his peril the registrant must at short intervals inquire at his last address given to the Board, was of the view that the government demands more than the regulation requires, stating:

> "The regulation, it seems to us, is satisfied when the registrant, in good faith, provides a chain of forwarding addresses by which mail sent to the address which is furnished to the Board may be by the registrant reasonably expected to come into his hands in time for compliance. Petitioner might have been more diligent by telephoning or calling at the union, but we conclude that he was justified in relying upon the efficiency of this experienced organization in advising him of the arrival of the notice."

Likewise, the petitioner here might have been more diligent, but he was justified in relying upon the advice of an accountant of 20 years' experience. At the very least, he was entitled to have this theory submitted to the jury.

B. The petitioner was found guilty of the crime of "willfully and knowingly failing to make income tax returns at the times required by law" (Appendix A. pp. 1, 2, 3) for the years 1952, 1953 and 1954 as charged in the three counts of the information.

Where the charge is that the accused "knowingly" did or did not do a certain act, ignorance of the law is recognized as a complete defense. It has been held that a person cannot be convicted of voting "knowing himself not to be a voter" if he thought he was qualified to vote, nor of "knowingly receiving a fee to which he is not entitled" if he thought he was entitled to it. *Perkins* in (1939) 88 U. of P. L. Rev. at 51; *cf. Keedy* in 22 H. L. R. at 89 n.l.

Although § 145(a) of the Internal Revenue Code of 1939 and § 7203 of the Internal Revenue Code of 1954 do not contain the word "knowingly", the petitioner was charged with "knowingly" failing to make an income tax return, and the issue was so submitted to the jury. Petitioner obviously cannot be charged with one crime and convicted of another. *Cole v. Arkansas*, 333 U. S. 196.

The present case strikingly illustrates the consequences which follow the erosion of boundaries heretofore delimited with care and precision by this Court in the *Murdoch* case. The requirement of an evil motive has been whittled away by verbal changes, until here it is abandoned so completely that the mere failing to file tax returns on time, without an evil motive, is held to support an inference of willfulness and a criminal conviction. The considerations that impelled review in the *Spies* case—the need for clarifying and restating the scope and meaning of an important federal statute in the face of diverse and beclouding interpretations and obviously incorrect instructions to the jury,—are fully applicable here.

VIII. CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1957.